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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL JACQUES,

Plaintiff and Appellant,

v.

LA MESA DODGE, INC.,

Defendant and Respondent.

D055183

(Super. Ct. No. 37-2008-00079978-  
CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,  
Ronald L. Styn, Judge. Reversed and remanded with directions.

Paul Jacques appeals from a summary judgment entered against him in his action against La Mesa Dodge, Inc. Jacques contends that the trial court erred in granting the motion because the affidavits he submitted revealed that facts essential to opposing the motion existed but could not be presented. (Code Civ. Proc., § 437c, subd. (h), hereinafter § 437c(h).) We agree.

## FACTUAL AND PROCEDURAL BACKGROUND

In July 2007, Jacques took his 1995 Dodge pickup truck to La Mesa Dodge because he was having transmission problems. La Mesa Dodge replaced the transmission. During the next two months, Jacques returned five times to the dealership because of transmission problems, including transmission and hydraulic fluid leaks. La Mesa Dodge either replaced the transmission or performed other work on it. A few days after the last repair, the truck stopped running and its underside caught on fire. Jacques observed transmission fluid leaking and in flames.

Jacques informed Chrysler, the manufacturer of the truck, about the incident. Chrysler sent an investigator, William Alexander, to interview Jacques and inspect the truck. Alexander purportedly drafted a fire investigative report for Chrysler concluding that transmission fluid leaking onto the exhaust pipe caused the fire.

In March 2008, Jacques sued La Mesa Dodge and Chrysler for strict products liability, breach of implied warranties of fitness and merchantability, breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, and negligent infliction of emotional distress. After Jacques dismissed Chrysler from the action, La Mesa Dodge moved for summary judgment. La Mesa Dodge presented a declaration from its accident investigator, Karl F. Kolodzik, concluding that a problem in a wire harness caused the fire, and that La Mesa Dodge had never worked on the wire harness.

In opposition to the motion, Jacques's counsel, Ehud Gersten, filed a sworn declaration stating that Chrysler's counsel had given him a copy of Alexander's fire

investigation report. Alexander, however, would not voluntarily cooperate by providing a declaration reiterating the contents of his report or authenticating it. Accordingly, Gersten stated that he intended to subpoena Alexander as a witness at trial in two months.

La Mesa Dodge objected that Alexander's fire report was inadmissible due to lack of authentication. The trial court sustained the objection and granted the summary judgment motion on grounds that Jacques had failed to present any admissible evidence to dispute the cause of the fire as "an electrical event in the wire harness."

The following week, Jacques moved for an ex parte order setting aside the summary judgment ruling. Gersten argued that he had made the requisite showing under section 437c(h) for the court to either deny the motion or grant a continuance, although he had inadvertently failed to expressly request a continuance. Gersten further stated that Alexander was now willing to provide an authenticating declaration, and presented an e-mail from Chrysler's counsel suggesting that Gersten prepare such a declaration for Alexander's signature.

The trial court agreed to set aside the order granting summary judgment nunc pro tunc, and to continue the motion to allow Gersten time to produce a declaration authenticating Alexander's report. The court stated that the declaration was to be filed by March 2, five days later, with the continued hearing date rescheduled for March 6, because trial was set to start on March 13.

At the hearing, Gersten presented his sworn declaration explaining that Chrysler's counsel was unwilling to allow Alexander to authenticate his report, but had agreed to allow Alexander to appear as a witness at trial to authenticate it. Gersten attached an e-mail from Chrysler's counsel stating that Chrysler had instructed him to work with Gersten "to produce Mr. Alexander for trial, but nothing more." The court told Gersten, "You were sandbagged, I understand. . . . I don't think I have a statutory way out, I mean, unless you can come up with something." After hearing further argument, the court explained, "[u]nder the law I have no choice. And I realize the policy is to hear the cases on their merits, but you've got to give me something." The court then granted the motion for summary judgment. Jacques timely appealed.

## DISCUSSION

We conclude Jacques is correct in asserting that the trial court erred in concluding that it had no option other than granting the summary judgment motion.

The summary judgment statute provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (§ 437c(h).)

The Legislature added section 437c(h) "[t]o mitigate summary judgment's harshness" by "making continuances - which are normally a matter within the broad discretion of trial courts - virtually mandated . . . ." (*Bahl v. Bank of America* (2001))

89 Cal.App.4th 389, 395.) Where the opposing party submits an adequate affidavit showing that essential facts may exist but cannot be presented timely, the court must deny summary judgment, or grant a continuance, or make another order as may be just. (§ 437c(h); *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.)

Jacques did more than simply show that evidence essential to opposing the motion "may exist." (§ 437c(h).) He actually presented the evidence, albeit without the requisite authentication, and explained why the evidence had not been authenticated. In its tentative ruling, the trial court acknowledged that Alexander's report created a triable issue of fact, but explained that the report was inadmissible, and without admissible evidence to show an alternate cause for the fire, all of Jacques's causes of action failed.

Thereafter, the trial court properly granted Jacques's ex parte request for a continuance, but erroneously concluded at the continued hearing that it had "no choice" other than to grant the motion. Where, as here, counsel has presented affidavits that satisfy section 437c(h), the trial court "*shall* deny the motion, or order a continuance . . . or may make any other order as may be just." (§ 437c(h), italics added.) Accordingly, the trial court abused its discretion when it granted summary judgment because its comments at the continued hearing revealed a misunderstanding of the law. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85 ["A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand"].)

Although La Mesa Dodge suggests Jacques did not diligently pursue discovery, the trial court made no such finding. And we note that the discovery deadline had already passed. Rather, the trial court expressly found that counsel had been "sandbagged." La Mesa Dodge also asserts that Jacques erroneously failed to request a second continuance at the continued hearing on the motion. Jacques, however, did not need to request a second continuance because the affidavits he presented revealed facts that would have allowed the trial court to deny the motion outright.

#### DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to deny the summary judgment motion, or grant another continuance, or make another order as may be just. Plaintiff is awarded his costs on appeal.

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McINTYRE, J.

WE CONCUR:

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McDONALD, Acting P. J.

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AARON, J.